NO. 5481

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH BROWNLEE AND
BARBARA BROWNLEE,
Appellants,

vs.

MUTUAL BENEFIT HEALTH &
ACCIDENT ASSOCIATION
Appellee.

Appellee's Petition for Rehearing

McCAMANT & THOMPSON,
Attorneys for Appellee.

J. R. ROGERS, PRINTER

INDEX

NO. 5481

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOSEPH BROWNLEE AND
BARBARA BROWNLEE,
Appellants,

vs.

MUTUAL BENEFIT HEALTH &
ACCIDENT ASSOCIATION
Appellee.

Appellee's Petition for Rehearing

Appellee respectfully prays the court to grant a rehearing of the above entitled cause for the following reasons:

ARGUMENT

On page 3 of the prevailing opinion we find the following language:

> "If as contended there is no evidence in the record from which the jury may do other than

speculate or guess as to the cause of death, then the judgment should be affirmed.

Reading Co. vs. Boyer (C. C. A. 3rd), 6 Fed. (2d) 185.

Philadelphia & R. Ry. Co. vs. Cannon (C. C. A. 3rd), 296 Fed. 302.

Spain vs. Oregon-Washington R. & N. Co., 78 Ore. 355.

Medsker vs. Portland R. L. & P. Co., 81 Ore. 63."

The court has accepted the foregoing principle as the touchstone by which to determine the sufficiency of the case made by plaintiffs.

CASES CITED IN OPINION

In support of the conclusion reached that appellants offered testimony sufficient to go to the jury in this case, the court on pages 9 and 10 of the opinion cites the following cases:

Northwestern Mutual Life vs. Stevens, 71 Fed. 258.

Carpenter vs. Supreme Council, 79 Mo. App. 597.

Tisdale vs. Insurance Company, 26 Iowa 170.

Lancaster vs. Washington Life, 62 Mo. 121.

These were all life insurance cases. The ultimate fact to be established by plaintiff in each of these

cases was the death of the insured. In this case it is necessary for appellants not only to prove the death of Leslie Brownlee but also that he sustained a fatal accident and that the accident happened prior to noon of January 1st. We concede that the long absence of Leslie Brownlee following his separation from Al Feyerabend on Mt. Hood on the 1st of January, 1927, coupled with the fact that he had no indebtedness, was in good health and had no serious trouble so far as known, makes a case sufficient to submit to the jury on the question of whether or not he is dead. We claim, however, that the testimony contained in the record wholly fails to show that he died by accident and especially that he died by an accident sustained prior to noon of January 1st, 1927.

On page 9 of the prevailing opinion the court quotes from Judge Sanborn's opinion in Northwestern Mutual Life vs. Stevens with reference to the presumption arising when one is last seen in a position of imminent peril. On page 262 of 71 Fed. and in the same opinion Judge Sanborn says:

> "There was no proof that the insured was last seen in the presence of an imminent peril that might properly cause his death."

The statement quoted was therefore made arguendo and was not necessary to the decision of the case which was before the court.

On page 260 of the report the court stated:

"It is a general rule that a state of facts once shown to exist is presumed to continue until a change, or facts and circumstances inconsistent with its continued existence, are proved. A living man is presumed to continue to live until the contrary is shown or is presumed from the nature of the case. All the authorities concur in the general proposition that the presumption of life continues seven years after the unexplained disappearance of a man under ordinary circumstances, from whom no tidings return to his friends or acquaintances, and that then the presumption of life ceases and the presumption of death arises."

On page 261 the court states:

"It is conceded that when one who is last seen in a state of imminent peril that might probably result in his death is never again heard from though diligent search for him is made, the inference of immediate death may be drawn."

Further on the same page the court stated:

"On the trial of this case there was no request for a peremptory instruction to the jury to find this important fact either way and hence the question whether or not there was sufficient evidence in the case to warrant the finding of the death of the insured before the commencement of these actions is not presented for our consideration. That question was sent to the jury by common consent."

The court also refers to the case of

Carpenter vs. Supreme Council Legion of Honor, 79 Mo. App. 597,

as supporting the principle stated in 71 Fed. 216, *supra.*

The facts in this case do not show danger of involuntary death, but rather an intention to commit suicide and an opportunity to do so by jumping in the river. The word "peril" is used in the opinion, but it is used only with reference to the psychological condition of the insured. On pages 600-602 of the report the Missouri Court discusses the facts with emphasis on the suicidal tendencies of the insured. The court then says:

> "It is a psychological truth that a mind revolving the thought of self-destruction and ultimately deciding to put it into execution, is in an abnormal condition and becomes a constant source of ready peril to its possessor dependent on the opportunity for effecting its purpose. When last seen Mr. Carpenter was near the river; it was nightfall; he was oppressed with past failures, in dire need in the present and hopeless of the future, and by his own confession bent upon putting an end to his life. His last words indicate that he had grasped the opportunity presented by the river and intended to use it. To say under these circumstances that he was not then in a position of particular peril, would be to ignore the known law of mental science subjecting the will and action to the dominance of an idea which has mastered the intellect."

Plaintiffs' evidence in the case at bar shows affirmatively that Brownlee's mental condition was normal (Record 42-43).

The Missouri decision has no tendency to show that Brownlee was in a state of imminent peril when he parted with Feyerabend.

The next case cited is

Tisdale vs. The Connecticut Mutual Life Ins. Co., 26 Iowa 170.

This case involved no question of imminent peril to the insured. The question was whether an inference of death could be drawn from the absence of insured for a period approximating two years, the evidence showing that his family relations were happy and his business was fairly prosperous. The court holds that death may be established prior to seven years without showing the existence of danger or peril, but states on page 175:

> "The first instruction announces the rule that the death of an absent person cannot be presumed, except upon evidence of facts showing his exposure to danger, which probably resulted in death, before the expiration of seven years from the date of the last intelligence from him; and that evidence of long absence without communicating with his friends, of character and habits, making the abandonment of home and family improbable, and of want of all motive or cause for such abandonment which can be supposed to in-

fluence men to such acts, is not sufficient to raise a presumption of death."

This instruction was held to be erroneous.

The case cannot be said to support the proposition for which it is cited by the court.

The next case cited is that of

Lancaster vs. Washington Life Insurance Co., 62 Mo. 121.

This case also does not support the proposition for which it is cited, as is shown by the following language on page 128 of the opinion:

> "The rule contended for by the defendant is, that where the evidence of death is circumstantial only, the jury are not warranted in inferring death, unless the evidence shows that the party whose death is sought to be established, was, when last heard from, in contact with some particular peril calculated to shorten or destroy life. The rule as thus stated, while it has the support of some distinguished names, and is undoubtedly correct as far as it goes, is much more restricted than that laid down in the case of Tisdale vs. The Conn. Mut. Life Ins. Co. (26 Ia. 170), and which has received the approval of this court in the case of Hancock, Adm'r of Morris, vs. The American Life Ins. Co. ante, p. 26."

We will now turn to the case of

Hancock vs. The American Life Ins. Co., 62 Mo. 26,

referred to in the language quoted above. The court in this case points out the distinction which we have

heretofore stated, namely, that where the insured is seen in such a condition that he is exposed to the perils of disease or accident, his death may be presumed at a time short of seven years, but his death is not presumed *eo instante* after he was last seen. On page 32 the court states:

> "Mere absence, unattended with other circumstances, will not be sufficient. In Eagle's case (3 Abb. Pr., 218), it was said that, if it was attempted to apply the presumption short of seven years, special circumstances would necessarily have to be proved; as for example, that at the last accounts the person was dangerously ill, or in a weak state of health, was exposed to great perils of disease or accident; that he embarked on board of a vessel which has not since been heard from, though the length of the usual voyage has long since elapsed. In all such cases, if the circumstances known are sufficient to authorize the conclusion, the decease may be placed at a time short of seven years."

The court also refers to *17 C. J. 1169.* In order to make clear the text of the author of that work, we quote from the text beginning at paragraph 5 on page 1166:

> "The presumption of the continuance of life, is overcome or displaced by the presumption of death which arises from the unexplained absence of a person from his last or usual place of residence for a sufficiently long period of time without having been heard of during such period, although it has been said that, in the absence of a statute, mere lapse of time since a person was last heard from is not sufficient evidence of

death. The presumption of death from unexplained absence is not, however, a presumption of law, but a mixed presumption of law and fact, which may be rebutted, and it will not be indulged where the circumstances of the case are such as to account for the absence of the person without assuming his death; and it has been held that he who relies upon an unexplained absence must not only prove it, but must also produce evidence to justify the inference that death is the probable reason why nothing is known about the missing person.

"At common law the rule was that a presumption of death arose from an unexplained absence of seven years, and this is the rule which prevails in nearly all jurisdictions, although in a few jurisdictions a shorter period has been prescribed by statute.

"The presumption of death from seven years' absence does not preclude an inference that death may have occurred before the expiration of such period where there are circumstances which would justify a conviction that death occurred at an earlier date, as for instance that the absent person, during the period after his disappearance encountered some specific peril, or was subject to some immediate danger calculated to destroy life, or where the circumstances are such as to make it improbable that he would have abandoned his home and family, or that when he left home he was in poor health or in a precarious physical condition."

With respect to the subject of time of death, the author of the same text states on page 1174:

"There is much confusion among the cases, sometimes among those in the same jurisdiction,

> upon the question whether the presumption of death from seven years' absence raises any presumption as to the time of the death. * * * The party alleging death before the expiration of the seven years must prove it, and according to some authorities, where the legal limit of seven years is not relied on stronger proof is required to raise a presumption of death than if the absence had continued until the expiration of that period."

As we have already pointed out, the cases cited in the prevailing opinion and discussed by us *supra* were all life insurance cases. The death of the insured was the circumstance alleged on the one side and denied on the other. In none of these cases was it essential to prove death by accident or at a particular hour.

NOT A CASE OF IMMINENT PERIL

We do not question that an inference of death may be properly drawn from evidence that a party was last seen in a state of imminent peril. Such an inference might properly be drawn from the fact that a man was last seen on a sinking ship or in a burning building.

This is not such a case. Leslie Brownlee when he parted with Feyerabend was at a place where he went voluntarily. He was an experienced mountaineer (Record 31); he had climbed Mt. Hood several times and must have had some familiarity with the terraine; he was equipped to cope with the conditions

which were to be found on the mountain. He wore heavy woolen underwear, woolen hiking trousers, two pairs of woolen socks, rubber shoe packs, a woolen shirt, two sweaters and over that clothing a marine suit which made his clothing waterproof from head to foot. When he left Battle Axe Inn he carried a pack sack in which there were four thermos bottles, two of them filled with hot tomato soup, one with hot tea, one with a lukewarm solution of orange and lemon juice. (Record 31.) He and his companion also had some solid food with them (Record 42). The testimony indicates that at the time when Brownlee separated from Feyerabend a large part of this nourishment was still intact. Brownlee had beavertail snowshoes for use when walking on snow and crampons for use when he came to ice (Record 32). He was twenty years of age (Record 62), and was in good physical condition (Record 42-43). Mr. Feyrabend, who was a witness for appellants, says on pages 42-43 that Leslie Brownlee was quite muscular; that he was not of a wiry build but that he could stand a lot of hiking; that he was not nervous but was well poised; when the two young men separated Brownlee talked sensibly and quietly and was perfectly normal except that he was tired from the climb. Brownlee took with him a compass and he was correctly advised that a south course would take him to the highway. (Record 34-35.)

Brownlee gave up his attempt to ascend the mountain not because he was conscious of any danger, but because "he did not feel like the climb was worth the effort." (Record 34.)

Feyerabend after going further up the mountain returned to Battle Axe Inn at 4:30 P. M. (Record 40.) The party of four who were a short distance behind Brownlee and Feyerabend, consisting of Helen Dimmick, Helen Hansen, Basil Clark and LaVerne Coleman, had no difficulty in getting back to Battle Axe Inn at 3 o'clock on the afternoon of January 1st (Record 65-66).

It is true that there were on the mountain cliffs over which one might fall and crevasses into which one might stumble. It is respectfully submitted that the possibility of such an accident does not constitute imminent peril.

In—

U. S. vs. Outerbridge, 27 F. C. 390, 392; 5 Sawy. 620,

Mr. Justice Field says:

> "By imminent danger is meant immediate danger, one that must be instantly met."

This language is followed by the Oregon Supreme Court in

State vs. Smith, 43 Ore. 109, 116.

In—

Eckhardt vs. City of Buffalo, 46 N. Y. S. 204, 211,

it is said:

> "'Imminent' denotes that something is ready to fall or happen on the instant."

It was held in that case that the circumstances relied upon did not constitute imminent peril.

The word "imminent" is derived from "imminere" which means to project over, overhand. We think the testimony wholly failed to show a situation to which the expression "imminent peril" can be properly applied.

PRESUMPTIONS APPLICABLE

The presumptions do not help these appellants. In

1 Jones on Evidence (3rd Ed.), Sec. 60,

it is said:

> "When a person is shown to have been living at a given time, the continuance of life will be presumed until the contrary is proved or is to be inferred from the nature and circumstances of the case."

This language is approved by the Supreme Court of Illinois in

> *Chicago & Alton vs. Keegan,* 185 Ill. 70, 56 N. E. 1088, 1090.

In re Hall, 1 Wall. Jr. 85, 11 F. C. 204, 209,

Judge Baldwin says:

> "The life of a person once shown to exist is intended to continue until the contrary is proved or is presumed from the nature of the case."

Section 799, Oregon Laws, Subdivisions 26 and 33,

is as follows:

> "All other presumptions are satisfactory unless overcome. They are denominated disputable presumptions and may be controverted by other evidence. The following are of that kind:
>
> "26. That a person not heard from in seven years is dead.
>
> "33. That a thing once proved to exist continues as long as is usual with things of that nature."

If we eliminate from the case the element of time which has elapsed since Brownlee separated from Feyerabend, the evidence would certainly not warrant the conclusion that Brownlee is dead. The evidence shows that a diligent search was made for Leslie Brownlee and that this search continued for a week after January 1st, 1927. Those engaged in this search did not believe him dead. This circumstance is important in determining whether there was evidence sufficient to go to the jury on the question of fatal accident prior to noon of January 1st. The long time which has since elapsed without tidings from

him may justify the inference that he is dead, but we respectfully submit that it does not justify the inference of death by accident; it certainly does not justify the inference of fatal accident within an hour after Brownlee separated from Feyerabend.

An excellent case dealing with the presumptions arising on the disappearance of a party is

Goodier vs. Mutual Life, 158 Minn. 1, 196 N. W. 662.

This was an action brought upon a life insurance policy and the contention of plaintiff was that the death of the insured was to be inferred from his disappearance. The disappearance took place on the 14th of November, 1914, and the policy remained in force by its terms for four years thereafter. The testimony showed that the insured was a man of good standing in the community where he resided, that his family relations were happy, but that he had been guilty of some peculations which were about to be exposed. The case was submitted to the jury and the jury found for plaintiff. The court thereafter sustained a motion of the defendant for judgment notwithstanding the verdict and the action of the trial court in sustaining this motion was upheld by the Supreme Court of Minnesota. The case is interesting because the court overrules the earlier Minnesota case of

Behlmer vs. Grand Lodge, 109 Minn. 305, 26 L. R. A. (N. S.) 305, 123 N. W. 1071.

The court held that to permit the jury to assume or infer the death of the insured within four years of his disappearance on the record in that case "would remove cases of this kind from the control of law and permit their decision by wholly uncontrolled and always differing notions of fact."

LEGAL EVIDENCE REQUIRED

The burden was on plaintiffs in the court below to prove that a fatal accident was sustained and that this accident took place prior to noon of January 1st. If the testimony be regarded most favorably to plaintiffs it proves the mere possibility of facts entitling plaintiffs to recover.

In—

Martini vs. Oregon Washington Co., 73 Ore. 283, 288, it is said:

> "In order that a verdict may be supported by the evidence, there must be some legal evidence tending to prove every material fact in issue, as to which the party in whose favor the verdict was rendered, had the burden of proof."

This was a case where an appeal had been taken from an order setting aside a judgment and granting a new trial. The above language is followed by the Oregon Supreme Court in two later cases.

Schneider vs. Tapfer, 92 Ore. 520, 545-546.

Maupin Warehouse Co. vs. Fleming, 121 Ore. 531, 537.

Under the conformity rule the law of evidence as declared by the Oregon Supreme Court is applicable to this case. We respectfully contend that there is no legal evidence to prove an accident sustained by Leslie Brownlee and especially no legal proof to sustain the contention that such an accident took place prior to noon of January 1st, 1927. Proof that he was at a place where it was possible to sustain a fatal accident does not meet the requirements of the Oregon authorities.

INFERENCE FROM SEARCH

At the top of page 9 of the prevailing opinion we find the following sentence:

> "The search which the evidence showed was made was sufficient to leave it a question for the jury to determine whether death was the result of accident or one of the other possible causes."

It is unnecessary to call the attention of the court to the fact that the results of the search were wholly negative.

In the sentence quoted the court probably intends to hold that the failure to find the body of Leslie Brownlee justified the jury in assuming that he had fallen into a crevasse. This we think is carrying the doctrine of circumstantial evidence to an extent not warranted by sound reason. It should be borne in mind that plaintiffs' testimony shows that there was

a continuous snowfall on Mt. Hood from January 1st to 6th inclusive. (Phillips, Record 51, 53.) Plaintiffs' testimony also showed that on certain parts of the mountain the snow is perpetual. (Phillips, Record 53; Stadter, Record 55.) The foregoing testimony is entirely uncontradicted. The failure to find any trace of Leslie Brownlee may be accounted for by the fact that he was buried in snow at a point on the mountain so high that he was not uncovered in the following summer.

It may be said that the jury were not bound to reach this conclusion. We answer that it is a conclusion as much warranted by the testimony as is the assumption that Brownlee fell into a crevasse. This latter conclusion can be reached only by surmise and speculation.

Even if it can be properly assumed that Brownlee fell into a crevasse, this assumption does not make out a case for these appellants. Before they can recover they must prove a fatal accident occurring before noon on January 1st. If we assume that there was a fatal accident where is there a syllable of testimony from which the conclusion can be drawn that it occurred within the life of appellee's policy?

Plaintiffs' contention is that Brownlee and Feyerabend separated at 11 A. M. (Record 47). To pass up to the jury the question of whether there was a fatal accident within an hour after that time is to

invite a verdict based wholly on speculation or surmise. This is the practice which is condemned in

Reading Co. vs. Boyer, 6. F. (2d) 185.

Philadelphia & Reading Co. vs. Cannon, 296 Fed. 302.

Spain vs. Oregon Washington Co., 78 Ore. 355.

Medsker vs. Portland Railway Co., 81 Ore. 63.

The court accepts the law laid down by these authorities. It is submitted with deference that the prevailing opinion fails to apply the law to the facts disclosed by this record. There is a failure to distinguish between possibility and proof. The majority opinion permits the jury to assume that there was a fatal accident within the life of appellee's policy on evidence which merely points to the possibility of such an accident.

We have again read the record with care and have found no testimony negativing the assumption (2) that insured became lost, and having exhausted his food supply, starved to death; (3) that insured, having become tired and exhausted, stopped to rest and subsequently froze to death; or (4) that insured, because of the physical strain to which he had been subjected, died of natural causes.

If the case had been submitted to the jury and the jury had eliminated these hypotheses from the case,

we contend they would have acted on mere surmise and their verdict would have been based on speculation rather than proof.

Believing that the court has misapprehended the condition of the record and the rights of the parties thereunder, we respectfully petition for a rehearing.

McCamant & Thompson,
Attorneys for Appellee.